IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL MISC.APPLICATION No. 11405 of 2006
With
CRIMINAL MISC.APPLICATION No. 3239 of 2006
With
CRIMINAL MISC.APPLICATION No. 3237 of 2006
With
CRIMINAL MISC.APPLICATION No. 2453 of 2006
With
CRIMINAL MISC.APPLICATION No. 2455 of 2006

For Approval and Signature:

HONOURABLE MR.JUSTICE AKIL KURESHI

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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MRS.LAKHI MULUBHAI MODHVADIA
Versus
THE STATE OF GUJARAT AND ANOTHER

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Appearance :
CRIMINAL MISC.APPLICATION Nos.11405/06, 3237/06 & 3239/06
MR YATIN OZA, Senior Advocate with MR BP GUPTA for Applicant.
MR AY KOGJE, APP for Respondent No.1.
MR SV RAJU with MR VIRAT G POPAT for Respondent No.2.
CRIMINAL MISC.APPLICATION Nos.2453/06 & 2455/06
MR AY KOGJE, APP for Applicant.

MR SV RAJU with MR VIRAT G POPAT for Respondent.

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CORAM : HONOURABLE MR.JUSTICE AKIL KURESHI

Date : 03/05/2007

ORAL JUDGMENT

1) This group of Misc. Criminal Applications arise out of same complaint. Several aspects of the matter overlap. These applications have, therefore, been heard together and are being disposed of by this common order.

2) On 16th November 2005, a complaint bearing C.R.No. I-170/2005 came to be lodged before Kamlabag Police Station of Porbandar District by one Kishor Bhimabhai Bhutia.

2.1) In short, the complainant stated in complaint that he is a driver of one Mulubhai Gigabhai Modhvadia, whose Tata Safari car he drives. On 15-11-2005, the complainant and Mulubhai after attending a dinner at Adityana proceed to return to Porbandar along with one Pratapbhai, who was dropped near Millennium Tower, after which the complainant along with Mulubhai had reached the residence of Mulubhai. He had parked the car near the house at about 12:30 in the night. Mulubhai got down from the car and was proceeding towards his house and the complainant was parking the car, when he heard the shots being fired. He, therefore, got down from the car and saw that one white coloured Maruti Van breezed pass him due to which he could not read the number of the vehicle. He found that behind the Safari Car, Mulubhai was lying and could not speak. The complainant, therefore, rushed and knocked the door of the house, upon which the wife of Bharatbhai and Bharatbhai (son of Mulubhai) came out. They thereafter

took Mulubhai to the Government hospital where he was declared "dead".

2.2) In connection with said criminal complaint, the investigating agency carried out investigation and during the course of investigation appears to have collected material regarding purchase of Maruti Van allegedly having been used in the crime. Statements of several witnesses have been recorded. Number of panchnamas drawn and ultimately, apparently, charge sheet has been filed against several persons including Laxmanbhai Bhimabhai Odedara, Dudabhai Hajabhai Odedara and Rajubhai Karsanbhai Odedara.

3) Laxmanbhai Bhimabhai Odedara, after his arrest, came to be released on regular bail by this Court by an order dated 10th March 2006 passed in Criminal Misc. Application No.1340/2006.

3.1) Dudabhai Hajabhai approached learned Additional Sessions Judge, Porbandar, who granted him regular bail by an order dated 21st January, 2006 passed in Criminal Misc. Application No.4/2006.

3.2) Rajubhai Karsanbhai similarly came to be released on regular bail by learned Additional Sessions Judge, Porbandar by an order also passed on 21st January, 2006 in Criminal Misc. Application No.9/2006.

3.3) The wife of the deceased Mulubhai has filed Misc. Criminal Application No.11405/2006 seeking cancellation of bail granted to Laxmanbhai Bhimabhai by this Court by an order dated 10-3-2006.

3.4) She has also filed Criminal Misc. Application No.3239/2006

seeking cancellation of bail granted to the accused Rajubhai Karsanbhai by learned Additional Sessions Judge, Porbandar. Misc. Criminal Application No.3237/2006 has also been filed by the wife of the deceased seeking cancellation of bail granted to Dudabhai Hajabhai by the learned Additional Sessions Judge.

3.5) The State has also preferred Misc. Criminal Application No.2453/2006 seeking cancellation of bail granted to Rajubhai Karsanbhai Odedara by the same order dated 21-1-2006 by the learned Additional Sessions Judge, Porbandar.

3.6) The State has also preferred Misc. Criminal Application No.2455/2006 seeking cancellation of bail granted to accused Dudabhai Hajabhai Odedara by learned Additional Sessions Judge, Porbandar on 21-1-2006.

4) While granting bail to the accused, Laxmanbhai Bhimabhai, by aforesaid order dated 10th March 2006, learned Single Judge of this Court took into consideration several aspects of the matter for granting bail. Sub-para (6) of para 2 of the order would indicate that the learned Judge considered “no criminal antecedent of the accused” as one of the grounds for granting bail. It would be useful to reproduce para-2 of the said order, since the same supplies the reasons, which weighed with the learned Judge for granting bail.

> “2. Following aspects are considered :-
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> (1) The applicant is facing charges for offences punishable under Sections 302, 201, 34, 120-B, 465, 468 and 471 of I.P.C., Section 25(1)BA of the Arms Act and Section 135 of the Bombay Police Act.

(2) The investigation is over and the charge sheet is filed.

(3) The applicant is in jail since 25th November, 2005.

(4) Undisputedly, the allegation against the applicant is that he had given an amount of Rs.1 lakh to co-accused for purchase of a vehicle, which was allegedly used in commission of the crime. The second fold of allegation is that this was done because of business rivalry.

(5) The first allegation regarding parting of money for purchase of car is indicated to be emerging only from statement of co-accused and in support of the second allegation about business rivalry, statement of Manjuben Bharatbhai dated 23rd November, 2005 is relied upon. Manjuben is daughter-in-law of the deceased and she speaks of some heated discussion between the applicant and the deceased which probably seems to have been settled there and then because when they parted, they had agreed that the deceased would attend the party proposed to be held on 15th November, 2005.

(6) The applicant has no criminal antecedents.

In the opinion of this Court, the material indicated against the applicant is not strong enough to deny bail to the applicant. The application deserves consideration."

4.1) The wife of the deceased has approached this Court seeking cancellation of bail by filing Misc. Criminal Application No.11405/2006 on following two grounds. (i) That the averment of the accused Laxmanbhai Bhimabhai that he has no criminal antecedent was false to his knowledge. It is pointed out that when the said bail application was filed by the accused he was already involved in another serious offence alleging offences punishable under Sections 397, 395, 307, 365, 506 (2), 323 of the Indian Penal Code and Section 3 (1) (10) of the Scheduled Caste and Scheduled Tribes (Prevention of Atrocities) Act. The applicant has placed on record an F.I.R., dated 11-12-2002 filed against accused,

Laxmanbhai Bhimabhai alleging commission of the said offence. (ii) That even after being released on bail by this Court, said accused has been involved in yet another criminal offence of committing theft from the properties of one Saurashtra Chemicals Limited, for which a complaint came to be filed on 5-10-2006, copy of which is produced on record. It is submitted that the complaint alleges that the accused had caused theft by illegally mining and that such illegal activities were being committed since five years from the date of filing of the complaint.

5) On these grounds, the application for cancellation of bail of Laxmanbhai Bhimabhai is sought to be sustained.

6) As noted earlier, two separate applications have been filed by the wife of the deceased as well as State seeking cancellation of bail granted to Dudabhai Hajabhai by the learned Additional Sessions Judge, Porbandar by order dated 21-1-2006. Primarily, prayer for cancellation of bail is being made on the ground that the learned Judge did not take into consideration relevant material before deciding the bail application and granted bail to an accused, who is prima facie found to have committed a serious offence of carrying out a well-planned murder.

7) On somewhat similar grounds, the wife of the deceased as well as State have also filed two separate applications seeking cancellation of bail granted to accused Rajubhai Karsanbhai by the learned Additional Sessions Judge on 21-1-2006.

8) Appearing for the private applicant, learned Senior Advocate, Shri Yatin Oza with briefing lawyer Shri B.P.Gupta submitted that from the order dated 10th March, 2006 passed by this Court itself, it is clear that one of the main consideration which weighed with the

learned Judge in granting regular bail to accused, Laxmanbhai Bhimabhai was that he had no criminal antecedents. It is pointed out that learned Judge relied on a statement made by the accused in bail application, which statement was also made by the accused before the learned Additional Sessions Judge while preferring his bail application.

8.1) It is submitted that admittedly this was an incorrect statement. It is not in dispute that accused, Laxmanbhai Bhimabhai on the date when this Court granted him regular bail was already facing another criminal charge pursuant to a complaint dated 11-12-2002.

8.2) It is, therefore, submitted that accused Laxmanbhai Bhimabhai made an incorrect statement and obtained bail from this Court. Since this Court also placed heavy reliance on the said fact of no antecedent of the accused, the bail order should be cancelled.

8.3) It is further submitted that even after the accused Laxmanbhai Bhimabhai was released on bail, he has continued his illegal activities and a criminal complaint has been filed against him on 5-10-2006 of having committed offences punishable under Sections 447, 397 and 114 of the Indian Penal Code. It is urged that said offence was a continuous offence and as per the complaint, the theft was going on since about five years. It is, therefore, submitted that the accused having misused his liberty while on bail, his bail order needs to be cancelled.

8.4) Reliance is placed by the learned Counsel on the decision of the learned Single Judge of Calcutta High Court in the case of **Ashok Kumar Kabra Vs. Kamala Devi Shaw and Others** reported in **1996 Criminal Law Journal 876**, wherein the learned Judge found that anticipatory bail order, which was passed on suppression of material

facts and incorrect statements in the affidavit, can be set aside in exercise of powers under Section 401 and 482 of the Criminal Procedure Code.

9) Learned APP, Shri A.Y.Kogje adopted the arguments made by the counsel for the applicant and submitted that since this Court was prompted to grant bail to accused Laxmanbhai Bhimabhai on the ground that he had no criminal antecedent, the bail order needs to be cancelled, once it is found that the statement was incorrect.

10) On the other hand, learned advocate Shri S.V.Raju appearing for the accused with Shri Virat Popat opposed this application. He submitted that learned Judge had given cogent reasons for granting bail to the accused. These reasons are not under review. Learned Judge found that the case against this accused is not strong enough to refuse bail. That being so, there is no possibility of cancelling bail already granted.

10.1) It is further contended that even as per the prosecution case, the respondent has not played any role in commission of offence. At best, it can be stated that he financed purchase of the Maruti Van, later on found to have been used in commission of the offence. That by itself would not give rise to a presumption that the respondent herein was in any way connected with the offence. Reliance in this regard is placed on the decision of the Apex Court in the case of **State of Maharashtra and Others Vs. Som Nath Thapa and Others** reported in **(1996) 4 SCC 659**, wherein it is observed that to establish a charge of conspiracy knowledge about indulgence in either an illegal or legal act by illegal means is necessary.

10.2) With respect to the fresh FIR filed against the accused, it is also submitted that the respondent herein has no direct nexus with the exploitation of the quarry. In any case, the offence is alleged to have taken place long back. It is submitted that trial in connection with said complaint is at an advance stage.

10.3) It is further submitted that the statement made before this Court that the accused has no criminal antecedent was only through oversight and not intentional. From the F.I.R. filed in the year 2002, it is pointed out that there is no direct role attributed to the present respondent.

10.4) It is, therefore, submitted that though no criminal antecedent is indicated as one of the considerations by the learned Judge for granting bail, in the facts of this case the bail is not required to be cancelled.

10.5) It is further submitted that consideration for cancellation of bail already granted are vitally different from those applying in a case where the Court is considering a petition for grant of bail. It is submitted that unless there are supervening circumstances of misuse of liberty by the accused while on bail, it would not be open for this Court to cancel the bail already granted, particularly, when such bail was granted by the High Court itself. Reliance in this regard is placed on the decision of the Apex Court in the case of **Gurcharan Singh and Others Vs. State (Delhi Administration**) reported in (1978) 1 SCC 118, wherein it is observed that the question of cancellation of bail under Section 439 (2) of the Criminal Procedure Code is certainly different from admission to bail under Section 439 (1). It was further observed that ordinarily High Court will not exercise its discretion to interfere with an order of bail granted

by the Sessions Judge in favour of an accused.

11) With respect to the bail granted to accused Dudabhai Hajabhai and Rajubhai Karsanbhai, learned Senior Advocate Shri Yatin Oza submitted that the learned Additional Sessions Judge committed a grave error in ordering enlarging these accused on bail when there is direct allegation against them of having committed a serious offence punishable with life imprisonment or even death.

11.1) It is further submitted that the observations made by the learned Additional Sessions Judge are not borne out from the record. Learned Senior Advocate also pointed out that one of the grounds on which the learned Additional Sessions Judge was pleased to release Rajubhai Karsanbhai was that one of the co-accused has been released on anticipatory bail. It is pointed out that ultimately, Samatbhai Goganbhai was not enlarged on bail pursuant to the order of anticipatory bail granted and he surrendered before the jail authorities and he is still in custody. It is, therefore, submitted that the ground of parity indicated by the learned Judge is not valid.

12) Learned APP, Shri A.Y.Kogje also submitted that bail granted to both accused Dudabhai and Rajubhai Karsanbhai by the learned Additional Sessions Judge should be cancelled. He submitted that despite involvement in serious offence, the learned Additional Sessions Judge without taking into consideration full facts of the case granted bail, which was not warranted. He submitted that in the facts of the present case cancellation would be called for.

13) On the other hand, learned advocate Shri S.V.Raju appearing for the accused along with Shri Virat Popat opposed these

applications and submitted that after being released on bail, these accused have not misused the liberty. The bail orders were passed nearly one year back and it would, therefore, not be appropriate to cancel the bail without there being any supervening circumstances and misuse of liberty.

14) Having heard learned advocates appearing for the parties, at the outset it may be noted that it is well settled by series of judicial pronouncements of this Court as well as the Apex Court, the consideration which would weigh with this Court while cancelling bail already granted are vastly different from those applicable in the case where the Court is considering the application seeking bail.

15) In the case of **Aslam Babalal Desai v. State of Maharashtra**, reported in (**1992) 4 SCC 272**, the Apex Court settled the ratio in this regard in the following terms :

> "On a conjoint reading of Sections 57 and 167 of the Code it is clear that the legislative object was to ensure speedy investigation after a person has been taken in custody. It expects that the investigation should be completed within 24 hours and if this is not possible within 15 days and failing that within the time stipulated in clause (a) of the proviso to Section 167 (2) of the Code. The law expects that the investigation must be completed with dispatch and the role of the Magistrate is to oversee the course of investigation and to prevent abuse of the law by the investigating agency. As stated earlier, the legislative history shows that before the introduction of the proviso to Section 167(2) the maximum time allowed to the investigating agency was 15 days under sub-section (2) of Section 167 failing which the accused could be enlarged on bail. From experience this was found to be insufficient particularly in complex case and hence the proviso was added to enable the Magistrate to detain the accused in custody for a period exceeding 15 days but not exceeding the outer limit fixed under the proviso (a) to that sub-section. We may

here mention that the period prescribed by the proviso has been enlarged by State amendments and wherever there is such enlargement, the proviso will have to be read accordingly. The purpose and object of providing for the release of the accused under sub-section (2) of Section 167 on the failure of the investigating agency completing the investigation within the extended time allowed by the proviso was to instill a sense of urgency in the investigating agency to complete the investigation promptly and within the statutory time frame. The deeming fiction of correlating the release on bail under sub-section (2) of Section 167 with Chapter XXXIII, i.e. Sections 437 and 439 of the Code, was to treat the order as one passed under the latter provisions. Once the order of release is by fiction of law an order passed under Section 437 (1) or (2) or Section 439 (1) it follows as a natural consequence that the said order can be cancelled under sub-section (5) of Section 437 or sub-section (2) of Section 439 on considerations relevant for cancellation of an order thereunder. As stated in Raghubir Singh v. State of Bihar, the grounds for cancellation under Sections 437(5) and 439(2) are identical, namely, bail granted under Section 437(1) or (2) or Section 439 (1) can be cancelled were (i) the accused misuses his liberty by indulging in similar criminal activity, (ii) interferes with the course of investigation (iii) attempts to tamper with evidence or witnesses, (iv) threatens witnesses or indulges in similar activities which would hamper smooth investigation, (v) there is likelihood of his fleeing to another country, (vi) attempts to make himself scarce by going underground or becoming unavailable to the investigating agency, (vii) attempts to place himself beyond the reach of his surety, etc. These grounds are illustrative and not exhaustive. It must also be remembered that rejection of bail stands on one footing but cancellation of bail is a harsh order because it interferes with the liberty of the individual and hence it must not be lightly resorted to."

16) Said principles have been reiterated number of times by the Apex Court in several decisions.

17) It can thus be seen that ordinarily and unless there are substantial and pressing circumstances, this Court would not be justified in cancelling bail already granted by the Sessions Court, unless, of course

there are supervening circumstances, particularly of misuse of liberty by the accused. Another recognized ground for interference with the bail order granted by the Sessions Court would be that the Sessions Court granted such a bail by passing a perverse order ignoring vitally material and wholly on irrelevant and improper considerations. [Refer to case of **Puran Vs. Rambilas and Another** reported in (2001) 6 SCC 338].

18) In the present case, in Criminal Misc. Application No.11405/2006, I am concerned with bail granted by this Court. The reasons indicated by the learned Judge for granting bail have achieved finality. Neither the applicant herein nor the State has appealed against such decision before the higher Court. In that view of the matter, it is not open for this Court to re-examine the reasons stated by the learned Judge and to take a different view. Only scope of this application would be, if it is demonstrated that the bail was obtained either on misrepresentation, in which case fraud would vitiate the order itself, or that there are supervening circumstances such as misuse of liberty by the accused while on bail or some such similar grounds, which would warrant cancellation of bail.

19) As noted earlier, the applicant, the wife of the deceased has pressed only two grounds seeking cancellation of bail granted to accused, Laxmanbhai Bhimabhai.

20) With respect to the question of antecedent of the accused concerned, it is undoubtedly true that it was stated before this Court that the accused has no criminal past. It is also true that the learned Judge noted this as one of the considerations for granting bail. However, perusing the order in its entirety it cannot be stated that this was sole ground for granting bail to the accused. In fact, the learned Judge was of

the considered opinion that the allegation regarding parting with money for purchase of car by the accused is emerging only from the statement of co-accused and regarding business rivalry, statement of Manjuben Bharatbhai (daughter-in-law of the deceased) would suggest that after some heated discussion between the accused and the deceased the issue was settled there and then while parting they had agreed that the deceased would attend party organized by the accused on 15th November, 2005.

20.1) In view of the above observations, learned Judge was of the opinion that the material against the accused is not strong enough to deny bail to him.

20.2) I have also perused the contents of the F.I.R. dated 11-12-2002 in which Laxmanbhai Bhimabhai is one of the co-accused. The complaint made allegation of assault and firing against Bhimabhai and in the latter portion it is stated that accused Laxmanbhai was also present there. Considering all these aspects of the matter, I do not find that this is a fit case where the bail already granted by this Court as far back as in March 2006 should be cancelled only on the ground that on the date of passing of this order, the accused was already involved in another criminal case. Additionally, I also find that there are no allegations that the accused has misused his liberty while on bail to influence the witnesses or to hamper prosecution.

20.3) With respect to subsequent criminal case also, it may be noted that the complaint suggested that under the instruction of this accused, some persons were illegally mining and that such activities have been going on since many years. I do not find that this would be strong enough reason to cancel the bail for the reasons already indicated herein

above.

21) However, respondent no.2 herein, i.e., original accused cannot be given another opportunity to indulge in any more illegal activities. It would, therefore, be necessary that his continued enjoyment of bail shall have to be conditional on his not entering Porbandar District till completion of the trial, except for attending the criminal trials being conducted against him.

22) With respect to other two bail applications also, I find that the applicants have not made out any case for cancellation of bail. The reasons indicated by the learned Single Judge of this Court while granting bail to accused, Laxmanbhai Bhimabhai would to some degree apply to these accused persons also. I have gone through the material collected by the prosecution. It would not be appropriate on my part to discuss the evidence threadbare at this stage since trial is yet to commence. However, it cannot be denied, as noted by learned Single Judge of this Court, that as per the statement of the daughter-in-law of the deceased, though there was heated discussion between the deceased and accused Laxmanbhai Bhimabahi few days before the incident, the issues had got settled between them on that date itself. Additionally, I find that both the accused are enjoying bail since June 2006 without any complaint of having misused the liberty. As noted earlier, in absence of misuse of the liberty and in absence of any other supervening circumstances justifying cancellation of bail, and since I find that learned Additional Sessions Judge did not grant bail on the basis of wholly irrelevant or improper considerations, I do not find that the bail can be cancelled.

23) It is true that the co-accused, on whose anticipatory bail

order some reliance has been placed by the learned Judge, to grant bail to Rajubhai Karsanbhai was later on arrested, nevertheless subsequent arrest of the co-accused would not be sufficient ground to cancel bail in the present case, when I do not find that liberty granted to the accused is misused in any manner.

24) In the result, subject to the directions contained in para 21 above, all these applications fail and are dismissed. Rule is discharged.

(Akil Kureshi, J.)

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